Marquette Law Review

Volume 61
Issue 2 *Winter 1977*

Article 2

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PUNITIVE DAMAGES IN STRICT LIABILITY CASES†

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As products liability litigation has increased, so have the claims for punitive damages.[1] Despite the enormous awards of punitive damages in this area,[2] neither the courts nor legal writers[3] have appreciably focused on the following issues:

(1) Whether the theory of punitive damages is consistent with the doctrine of strict liability in Wisconsin.

(2) Whether a punitive damages award in a products liability case is consistent with the aims of public policy.

UNDER WISCONSIN LAW, PUNITIVE DAMAGES ARE INAPPROPRIATE IN CASES OF STRICT LIABILITY FOR DEFECTIVE PRODUCTS.

The Wisconsin rule is clear: punitive damages will be awarded only where the harm was inflicted "under circumstances of aggravation, insult or cruelty, with vindictiveness or malice,"[4] or where the defendant acted in wanton, willful or reckless disregard of the plaintiff's rights.[5] Where no actual malice is shown, the character of the offense must have the outrageousness associated with a serious crime.[6] It is equally clear that gross negligence, that is negligence involving willful or reckless conduct, was abolished as a common law cause of ac-

† This comment is intended to supplement Professor Ghiardi's article, *Punitive Damages in Wisconsin*, 60 MARQ. L. REV. 753 (1977).

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1. Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972) [hereinafter cited as Tozer]; Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972).

2. Cases involving the drug MER/29 resulted in over $20,000,000 of punitive damages claimed against one Chicago manufacturer alone. Tozer, *supra* note 1, at 301; Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 684, 60 Cal. Rptr. 398 (1967) in which $250,000 of punitive damages were awarded.

3. Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895 (1976); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNSEL J. 402 (1977) [hereinafter cited as Snyman]; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) [hereinafter cited as Owen].

4. McWilliams v. Bragg, 3 Wis. 424 (1854).

5. Kink v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

6. Entzminger v. Ford Motor Co., 47 Wis. 2d 751, 177 N.W.2d 899 (1970); Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

tion in Wisconsin by *Bielski v. Schulze.*[7] Accordingly, a claim for punitive damages is eliminated except in those cases involving intentional torts.[8]

> We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases. But punitive damages are given, not to compensate the plaintiff for his injury, but to punish and deter the tortfeasor, and were acquired by gross negligence as accouterments of intentional torts. Willful and intentional torts, of course, still exist, but should not be confused with negligence. (See sec. 481 p. 1260 Restatement 2 Torts) The protection of the public from such conduct or from reckless, wanton, or willful conduct is best served by the criminal laws of the state.[9]

The district court construing Wisconsin law in *Drake v. Wham-O Manufacturing Co.,*[10] disregarded the *Bielski* rationale in denying a motion to dismiss the punitive damages allegation. The court stated:

> Where the principal claim is based on strict liability in tort and there is an additional claim of wanton disregard of the plaintiff's rights, it is a simple matter to allow the plaintiff to make a supplementary showing of aggravating conduct for the purpose of proving entitlement to punitive damages.[11]

The Drake court reasoned that this was an appropriate approach since "a claim for punitive damages is considered a prayer for a specific type of relief in Wisconsin, not a part of the claim itself. . . ."[11.1]

Despite the clear language in *Bielski* to the contrary, the *Drake* court effectively regenerated gross negligence as a justification for punitive damages in a case grounded on a negligence *per se* theory. Judge Gordon's approach, which split the claim for relief from the underlying cause of action, is counter not only to *Bielski,* but to the strict liability theory of products liability.[12]

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7. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

8. Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

9. Bielski v. Schulze, 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962).

10. 373 F. Supp. 608 (E.D. Wis. 1974). *See also* Heil Co. v. Grant, 534 S.W.2d 916 (Tex. 1976).

11. 373 F. Supp. at 611; *see* Hawes v. General Motors, No. 76CP2551 (Hampton County, S.C., filed March 12, 1976), unpublished order denying defendant's motion to strike punitive damages claim from products liability cause of action.

11.1 373 F. Supp. at 611.

12. *See* Snyman, *supra* note 3, at 406.

Wisconsin does not recognize an independent cause of action for punitive damages.[13] Rather, punitive damages must have a foundation of actual damages and specific aggravated conduct to "attach or rest upon."[14] If punitive damages are to be awarded in a negligence case, then the negligence itself must take on the character or nature of aggravated conduct to provide the necessary foundation.[15] It is precisely this characteristic which *Bielski* expressly eliminated from a negligence action and which the *Drake* decision recreated.

Strict liability as adopted in Wisconsin does not make the manufacturer an insurer nor does it impose absolute liability for a defective product.[16] Rather, it relieves the plaintiff of proving specific acts of negligence[17] and protects against certain defenses.[18] The liability arises not from any particular negligent act or finding of fault, but from the finding that a product is unreasonably defective.[19] Strict liability and negligence theories are mutually exclusive and are to be pleaded in the alternative.[20] Both recovery theories, if properly pleaded, may be submitted to the jury, but the final selection of special verdict questions and instructions must await the conclusion of the proof.[21] In *Howes v. Deere & Co.*,[22] the Wisconsin Supreme

13. Maxwell v. Kennedy, 50 Wis. 645, 7 N.W. 657 (1880).

14. *Id.* at 649, 7 N.W. at 658.

15. It is possible to make the argument that a different cause of action is created when an element sustaining punitive damages is alleged. That is, in proving aggravated conduct in a negligence action, no longer is the actionable conduct properly characterized as negligence, but rather, it is classified as intentional conduct in light of *Bielski* and not "strict" liability as known in Wisconsin. If such a metamorphosis is allowed, the applicable statute of limitations in Wisconsin is decreased from three years to two years. WIS. STAT. § 893.21 (1975).

16. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

17. *Id.*; Wis. J.I.-Civil No. 3260 states the necessary elements of proof are,

(A) product is in a defective condition

(B) defective condition made the product unreasonably dangerous to persons or property

(C) defective condition existed when product was under the control of the manufacturer

(D) product reached user without a substantial change in condition

See also RESTATEMENT (SECOND) TORTS § 402A.

18. Dippel v. Sciano, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967), notes that in adopting a products liability theory, the defense of lack of privity of contract is no longer applicable.

19. *Id.* at 459, 155 N.W.2d at 63.

20. *See* WIS. STAT. § 802.02(5)(b) (1975); Greiten v. La Dow, 70 Wis. 2d 589, 235 N.W.2d 677 (1975); Howes v. Deere & Co., 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

21. Howes v. Deere & Co., 71 Wis. 2d 268, 272, 238 N.W.2d 76, 79 (1976).

22. 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

Court consigned to the trial court's discretion the order and form of the special verdict. The court's hesitation in establishing a special verdict format where both strict liability and negligence are pleaded emanates from the distinctly different elements of proof required by each theory.[23]

Punitive damages on the other hand, were developed[24] long before the idea of holding a manufacturer liable for a defective product became popular.[25] They evolved in the context of a one-on-one relationship and were viewed as a form of punishment[26] — a deterrent for intentional and outrageous conduct.[27] Unlike products liability where the liability is predicated on the condition of the product and not the nature of the act, the character of the act in a claim for punitive damages is paramount.[28]

Federal District Judge Robert Warren recognized the inconsistency in doctrine and purpose and expressly countered the *Drake* decision in *Walbrun v. Berkel, Inc.*[29] In this case plaintiff claimed one million dollars in punitive damages as a result of defendant's alleged wanton disregard for the safety and well-being of plaintiff in the manufacture, design and assembly of the product.[30] In granting defendant's motion to strike plaintiff's allegation relating to punitive damages, the district court stated:

> Punitive damages are of course recoverable in the intentional tort type of case. . . . Examples of intentional tort cases which permit the recovery of punitive damages include,

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23. The decision as to whether to submit one question or two questions, and the order of submission in the event of two questions is to be made by the trial judge in each case. The reason it might be appropriate to submit both questions on occasion is that the liability imposed in a negligence per se case is not based upon a failure to exercise ordinary care with its necessary element of foreseeability, both common elements of an ordinary negligence case.

Id. at 273, 238 N.W.2d at 79 (citation omitted).

24. Punitive damages were first recognized in Huckle v. Money, 95 Eng. Rep. 768 (1763). Wisconsin adopted punitive damages over 123 years ago in McWilliams v. Bragg, 3 Wis. 424 (1854).

25. *See* Rice, *Exemplary Damages in Private Consumer Actions,* 55 IOWA L. REV. 307 (1969) [hereinafter cited as Rice]. In 1975 a total of over one million claims were filed totalling more than fifty billion dollars in value. Snyman, *supra* note 3, at 406.

26. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

27. *See* Ghiardi, *Punitive Damages in Wisconsin,* 60 MARQ. L. REV. 753, 774 (1977).

28. *See* Rice, *supra* note 25; Owen, *supra* note 3, at 1270.

29. 433 F. Supp. 384, 385 (E.D. Wis. 1976).

30. *Id.* at 384.

> *inter alia,* assault and battery, slander, libel, seduction, and malicious prosecution. . . .
>
> It therefore appears that punitive damages have been eliminated in Wisconsin except for those cases involving intentional torts. Plaintiff contends, however, that punitive damages are recoverable in the more aggravated types of product liability cases where it is alleged that the defendant acted in wanton disregard for the safety and well-being of the injured party. In this regard, plaintiff relies upon *Drake v. Wham-O Manufacturing Co.*. . . In *Drake*, Judge Gordon held that punitive damages are recoverable in product liability cases where there is "a showing of wanton, willful or reckless disregard of the plaintiff's rights."[31]

Noting that the *Drake* court relied on *Kink v. Combs,*[32] Judge Warren stated:

> This Court is not persuaded that *Drake* correctly applied the Wisconsin punitive damage rule. The *Kink* case involved the intentional torts of rape and assault and battery. The somewhat ambiguous language in the *Kink* opinion to the effect that the wanton, willful or reckless disregard of another's rights gives rise to punitive damages must be construed in the context of that case. Such conduct when viewed in the context of a negligence case merely gives rise to "gross negligence." In the case of negligent conduct, however aggravating, the Wisconsin Supreme Court has expressly precluded the recovery of punitive damages.[33]

Judge Warren's decision is clearly in line with existing Wisconsin law that in the absence of intentional conduct punitive damages are not to be awarded. Hopefully, in an appropriate case the Wisconsin Supreme Court will put to rest the concept that punitive damages may be recovered in a products liability case based on strict liability and so-called aggravated conduct.

Recovery of Punitive Damages in a Products Liability Case is Inconsistent With Public Policy

One of the most important foundations of the theory of products liability is that the manufacturer is in a better position to bear the losses and risks of defective products and to

31. *Id.* at 384-85 (citations omitted).

32. 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

33. 433 F. Supp. at 385, *citing* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

make an equitable distribution when losses do occur.[34] The expense of products liability insurance is made a part of the cost of doing business and is passed on to the consumer in the form of higher prices for the product.[35]

Aside from the question of whether the standard products liability policy insures against claims for punitive damages,[36] it is asserted by some authorities,[37] most notably those defending insurance companies and manufacturers, that such policy coverage would violate public policy.[38] The argument as stated in *Tedesco v. Maryland Casualty Co.*,[39] is that allowing a company to insure itself against the punishment intended in a punitive damages award defeats the purpose and effect of the law.

> A policy which permitted an insured to recover from the insurer fines imposed for violation of a criminal law would certainly be against public policy. The same would be true of a policy which expressly covered an obligation of the insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong.[40]

Characterized by one decision[41] as analogous to insuring against jail, a punitive damages recovery in a products liability case results in punishing the public, not the wrongdoer.

Recently the Insurance Services Office announced its intention to specifically exclude coverage for punitive damages from all personal and commercial liability insurance policies.[42] This reaction is largely in response to the growing number of jurisdictions[43] finding punitive damages coverage within the broad language of the standard liability coverage provision. Insurance Services Office concluded that the "punishment and deterrent

34. *See* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Snyman, *supra* note 3, at 406.

35. Tozer, *supra* note 1, at 302.

36. J. GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN § 3.02, at 33-37 (Callaghan, 1964) [hereinafter cited as GHIARDI].

37. *See* Tozer, *supra* note 1; Snyman, *supra* note 3; Rice, *supra* note 25.

38. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

39. 127 Conn. 533, 18 A.2d 357 (1941).

40. *Id.* at ____, 18 A.2d at 359.

41. Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934).

42. J. of Com., Aug. 23, 1977, at 10, col. 1.

43. *See* GHIARDI, *supra* note 37, for an analysis of cases. *See also* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

effect to others of punitive damage awards would be defeated by allowing individuals to insulate themselves from the possibility of such punishment through the purchase of an insurance contract."[44]

Deterrence is not even an effective argument for the plaintiff. Most certainly, the cost of increased insurance premiums resulting from larger products liability awards will be part of increased products prices.[45] Those companies unable to pass on costs or obtain products liability insurance will be forced out of business. The economic argument against punitive damages is that the plaintiff who receives punitive damages is also the consumer who pays for the recovery and accordingly is ultimately punished.[46]

CONCLUSION

The purpose in adopting strict liability was to create a cause of action similar to negligence *per se.*[47] By avoiding the necessity of proving specific negligence, the injured plaintiff is now able to recover more consistently from sellers who were previously protected from suit by the sheer inability of the plaintiff to trace back the product defect through layers of retailers, wholesalers, distributors and jobbers.[48] With a claim for punitive damages, the necessity to prove an intentional act on the part of the seller reappears — effectively eliminating strict liability as the basis for a cause of action.[49]

To date, no court has awarded punitive damages in a products liability case in the absence of a showing of aggravated conduct. The abolition of gross negligence in Wisconsin, however, precludes a claim for punitive damages where the cause of action is grounded in negligence or negligence *per se.*

Even in those states that recognize gross negligence as the basis for an award of punitive damages, such an award in a products liability case is inconsistent with the strict liability theory of liability and clearly contrary to the public policy basis for the doctrine.

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44. J. of Com., Aug. 23, 1977, at 10, col. 1.

45. *See* Owen, *supra* note 3. *See also* Long, *Punitive Damages: An Unsettled Doctrine,* 25 DRAKE L. REV. 870 (1976).

46. Tozer, *supra* note 1.

47. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

48. WIS. J. I. - CIVIL, No. 3200.

49. Tozer, *supra* note 1.